IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 442

VICTOR J. ORSINGER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals—not reported—was issued on June 3, 1970 (Appendix A. 1, *et seq.*).*

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*In the Court of Appeals, the case was considered on the original transcript of testimony and an appendix containing exhibits, the indictment, instructions to the jury, and procedural matters. The Appendix to the Petition contains the opinion and the opinion in *U.S. v. Johnson*, neither of which is yet reported. References to the Appendix herein will be "Appendix "; references to the Appendix below will be "App. "; references to the transcript will be "Tr. ".

GROUNDS OF JURISDICTION.

Victor J. Orsinger petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on June 3, 1970. A petition for rehearing, with suggestion for rehearing en banc, was denied by order filed July 1, 1970. Jurisdiction to review the Judgment on certiorari is conferred by Section 1254(1), 28 U.S.C.

QUESTIONS PRESENTED

Was the Petitioner immune from prosecution under the rule of *Edwards v. United States*, 312 U.S. 473, when, following a reservation of right against self-incrimination under Section 22(c) of the Securities Act of 1933 (15 U.S.C., Sec. 77v(c)), the Securities and Exchange Commission continued its examination of corporate records furnished by the Petitioner, pursuant to subpoena issued to the Petitioner personally, by the Commission?

Was the prosecution of the Petitioner unreasonably delayed by the Government, in violation of the Fifth and Sixth Amendments to the Constitution of the United States when the Government had full knowledge of the facts on which the prosecution rested, for three years and seven months prior to indictment?

Does a supplemental instruction, based on *Allen v. United States*, 164 U.S. 492 and *Commonwealth v. Tuey*, 8 Cush. 1, offend current standards for the administration of justice in Federal Courts, particularly when given to a plainly confused jury reporting "verdict impossible"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 22(c) of the Securities Act of 1933 (15 U.S.C., 77(v)(c)) provides:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on nine counts of larceny after trust. United States District Judge June L. Green sentenced the Petitioner to three to nine years imprisonment on each count, all sentences to run concurrently (App. p. 71).

Five years after the Securities and Exchange Commission began an investigation of the Petitioner and certain real estate corporations he controlled (Gov't Exh. 65, App. pp. 145-148), an elaborately constructed indictment was returned, charging the Petitioner with wire fraud in three counts, mail fraud in two counts, interstate transportation of a $50,000 check taken by fraud in one count and then, on a contradictory theory, nine counts of larceny after trust under Section 22-2203 of the District of Columbia Code (Appendix C. 1). No charge was made of any violation of any of the securities laws of the United States. The Jury acquitted on the first six counts charging fraud but convicted on the nine larceny after trust counts.

There is a lengthy narrative written into the first five counts which is omitted from the remaining ten; the narrative portrays a "'scheme and artifice to defraud" the American Province of the Sisters of the Divine Savior (par. 2, App. pp. 4-6). It is said (par. 2a) that the Petitioner, sole stockholder and dominant personality in Parkwood,

Incorporated, a real estate corporation, knew of the Sisters' wish to acquire property for a house of studies near Marquette University in Milwaukee, Wisconsin and induced them to acquire "for that purpose" an entire city block adjacent to the Marquette campus, at a cost estimated by him at $1,500,000. It is then said that the Petitioner induced the Sisters to float an issue of debt securities underwritten by Keenan & Clarey, Inc., to raise the needed funds and induced them to permit him to control the land acquisition upon a representation that $1,500,000 of the proceeds of the underwriting would be

> "deposited in defendant's attorney account and would only be disbursed from said account as needed to acquire real property in the Marquette Block."

Contrary to these representations, we are told, the

> "defendant knowingly, willfully and fraudulently * * * did expend the approximately $1,500,00 delivered him by the Sisters for the benefit, use and advantage of himself, Parkwood, its subsidiaries and affiliates."

Continuing in this strain, the indictment charges

> "that the $1,500,000 delivered by the Sisters to defendant in his capacity as attorney would be maintained in a 'Victor J. Orsinger, Attorney' bank account and would be disbursed from that account only as needed to acquire properties in the Marquette Block;

and

> "that the $1,500,000 delivered to defendant by the Sisters would be used for the exclusive purpose of acquiring real property in the Marquette Block."

While these quoted allegations were not built into the nine counts of larceny after trust, clearly, though inferentially, they represent the premise for the charges of fraudulent conversion of the following sums of money on the dates set out opposite the dollars:

$ 50,000	on	June 14, 1963
350,000	"	July 2, 1963
100,000	"	July 11, 1963
250,000	"	July 11, 1963
175,000	"	July 15, 1963
50,000	"	July 29, 1963
60,000	"	August 13, 1963
10,000	"	August 16, 1963
55,000	"	August 29, 1963

The indictment was returned on May 10, 1968, only two to three and one-half months before the statute of limitations would have barred prosecution.

The Government's case rested upon the route of nine checks which the prosecution was unable to link to specific property purchases in the "Marquette Block". Because the Government could not find the link and because seven of the checks were drawn on the Petitioner's attorney account to the order of Parkwood, another to the order of Adams Properties, Inc., a Parkwood Subsidiary, and still another endorsed by the Petitioner for deposit to Parkwood's account, the prosecution claimed fraudulent conversion.

The initial question before the Court of Appeals was whether the sums of money allegedly stolen represented money "entrusted" to the Petitioner for a special purpose or whether it was part of an unsecured general loan to Parkwood, Incorporated. The Court of Appeals decided the question against the Petitioner, partly because of the provisions of a written agreement set out in full in a footnote to the opinion (Appendix, A.7-10), though the Court did recite an antecedent proposal by which the Petitioner was to give the Sisters a mortgage on land purchased, a plain indication that a debtor-creditor relationship was contemplated (Appendix, A. 4).

Additional support for the Petitioner's position lay in Parkwood's ten percent interest bearing note (Gov't Exh. 21, App. p. 114), Mother Aquin Gilles' confirmation of a corporate indebtedness on February 10, 1964 (Tr. pp. 71-

72), a modification agreement of July 8, 1964, defining the boundaries of land the Sisters were to receive as a premium (Gov't Exh. 30, App. pp. 119-121), the payment of $250,000 on the corporate note (Tr. pp. 133, 134), the call for payment of the "debt securities" on June 22, 1965 (Deft's Exh. 12, App. pp. 328, 329), the Sisters' financial statements which set up the transaction as a loan and purchase of investment securities (Deft's Exh. 4-7, App. pp. 314-326), the Sisters' proof of claim in Parkwood's reorganization proceeding stating the consideration to have been "cash loaned to Parkwood, Incorporated" (Deft's Exh. 3, App. pp. 304, 305) and a report written by a Securities and Exchange Commission investigator in which Mother Aquin was reported as having said on October 6, 1964, that there was no agreement for segregation of the funds and,

> "she would not consider it contrary to the intention of the parties if the money had, in fact, been used in the general operations of Parkwood." (Deft's Exh. 2, App. pp. 302, 303).

The evidence originating with the SEC bears directly on the question of unreasonable delay. Over and above the report just mentioned, was the testimony of Mr. Harrington one of the Agency's Certified Public Accountants. Harrington had begun an audit of Parkwood's books in February, 1964, (Tr. pp. 409-412) and it was Harrington's data which was the foundation for the report. Simply stated, the Government was fully informed some years before indictment.

The Securities and Exchange Commission's investigation is, likewise, the source of the Petitioner's claim of immunity. In May, 1963, the Commission ordered an investigation of the Petitioner and two corporations he controlled, Parkwood, Incorporated and Adams Properties, Inc. (Gov't Exh. 65). The objective was to find out whether there had been any violation of the Securities Act.

Under date of September 4, 1964, the Commission issued an administrative *subpoena duces tecum* (App. pp. 13-15)

directing the Petitioner to appear and testify and to produce just about every conceivable corporate record of the corporations and "subdivisions" under investigation. As the Petitioner's motion to dismiss the indictment on grounds of immunity shows—and the Government conceded in its opposition—the petitioner reserved his right against self-incrimination and the interrogation stopped. Nevertheless, the Commission investigators continued to pore over the records for many months (App. pp. 13-16).

The Government memorandum opposing the motion states the situation this way (App. p. 16):

> "Petitioner states the facts correctly. The Securities and Exchange Commission did continue (sic) an examination of books and records of Parkwood, Inc. and other companies following petitioner's claim of self-incrimination. This statement of the facts does not, however, indicate how under 15 U.S.C. 77v(c) petitioner could have obtained immunity.
>
> "Petitioner does not allege that he was compelled to testify or that he was compelled to produce evidence. He does state that Parkwood was examined, but apparently not Orsinger. As a corporation, Parkwood has no Fifth Amendment rights."

With the concession of the Government striking the record, the first point is that no one is talking about Fifth Amendment rights; rather is the protection imbedded in the statute the Securities and Exchange Commission administers. The second point is that the Government was almost ludicrous in saying that the petitioner was not "compelled to produce evidence"; the closing words of the Commission's subpoena and command to appear are the terrifying

> "Fail not at your peril."

The charge to the Jury was, for the most part, standard in form and content; the Trial Judge refraining from specifics and taking no position on the interpretation to be given any of the written instruments in evidence.

Near the end, the Trial Judge admonished (App. p. 46):

> "Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusions of your fellows, you should examine the question submitted with candor and with proper regard in deference to the opinion of each other.
>
> "You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression upon the minds of so many jurors, equally honest and equally intelligent with him or herself.
>
> "If, on the other hand, the majority are for acquittal, the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment, which is not concurred in by the majority."

This abbreviated version of the Allen charge was enough to nudge any jury to unanimity if there were holdouts in the group. No need was there for further coercive instruction but given it was, after a demonstrated misunderstanding of fundamentals that should have been clear after six days of trial, after an intimated desire to avoid responsibility for decision and a declaration of inability to reach a verdict, expressed in the strongest terms.

The Jury retired to deliberate in the late afternoon of October 30, 1968. At 5:10 p.m., the Court excused the jurors until 9:30 the following morning (App. p. 53). Unfortunately, the record for October 31, 1968, does not time the following sequence precisely; the file jacket (2nd page of jacket cover) shows only that the Jury resumed deliberations at 9:30 and the transcript discloses that the Court adjourned at 12:15 p.m., after return of the verdict and polling of the Jury (App. pp. 63-65).

Counsel is able to say, however, that at approximately 10:30 the Jury sent a note to the Trial Judge, signed by

the foreman, which stated the following questions (App. p. 66, cf. pp. 56-57):

> "1. Is the Securities and Exchange Commission a party to this litigation?
>
> "2. Is the U.S. Government, as referred to in the Indictment and in the testimony the real plaintiff in this case or, is the U.S. Government prosecuting this case on behalf of the Sisters of the Divine Savior? In other words, is the real Plaintiff in this case the Sisters of Divine Savior?
>
> "3. In case of an adverse verdict, is this case appealable?"

To the first question, the Court responded in the negative; to the second, the Trial Judge told the Jury the Government was the plaintiff and the Sisters complaining witnesses; the third question was no concern of theirs, the jurors were told (App. pp. 56-57).

One hour later, counsel can advise the Court, the Jury sent in another signed note saying (App. p. 67):

> "VERDICT IMPOSSIBLE"

Then (App. p. 58):

> "THE COURT: Gentlemen, I am about to give the Allen charge to this jury. They have indicated, the last note said, "Verdict impossible!"

Counsel objected, initially on the ground that the substance of the charge had originally been incorporated in the Court's instructions and on the second ground that the supplementary instruction was inappropriate in the light of the very obvious confusion in the jurors' minds (App. pp. 58, 59).

Over these objections, the Court gave the charge from *Commonwealth v. Tuey* (App. pp. 58-62), the jury retired and brought in its verdict less than an hour later.

For a number of years, the Allen charge has been winning uncomplimentary comments and judicial frowns but this is not the point in the petition to discuss them. It is

in point to say that in the setting in which the charge was given, it represented a nondeliberative, extraneous force to which the jurors responded. A confused and hesitant jury answered the call in a hurry, aware, of course, that the Court wanted a verdict, aware that October 31st was the last day of their service and not unaware of the implication that they might be held over until all had resolved their doubts.

REASONS FOR GRANTING THE WRIT

The Court of Appeals rejected the Petitioner's argument that the evidence required acquittal because, among other things, Parkwood's interest bearing note demonstrated the existence of a debtor-creditor relationship and because funds do not freeze themselves; it takes a clear agreement of the parties or a specific statute to accomplish such a result, (*State v. Atlantic City Electric Co.*, 23 N.J. 259, 128 A. 2d 861; *Norman v. Judy*, 251 S.W. 2d 467, Ct of Appeals of Ky.; *Dunlop Sand and Gravel Corporation v. Hospelhorn, 172* Md. 279, 191 A. 701; *Bair v. Snyder County State Bank*, 314 Pa. 85, 171 A. 274; *Scott on Trusts*, 3rd Ed. Vol. I, Sec. 12.2; *U.S. v. Mason*, 218 U.S. 517, 54 L. Ed. 1133; *U.S. v. Gordon*, 118 F.2d 671, C.A. 2; *Anzoategui v. U.S.*, 118 U.S. App. D.C. 337, 335 F.2d 1000, C.A. D.C.).

Consideration of these questions may not be demanded by Rule 19 of the Rules of this Court but, it is submitted, review is demanded when a circuit departs from a clear decision of this Court on the important issue of self-incrimination, when it answers the constitutional argument of unreasonable delay with brief statements plainly contradicted by the record and when it dismisses, in a single sentence, so important a question as the Allen charge issue, an issue which has been plaguing the circuits for years (Appendix A. 17, 18).

The summary disposition of the last question is impossible to understand; sixteen days later, two members of the identical panel published an opinion exhaustively analyzing Allen

and its weaknesses and expressing the wish for review en banc (*U.S. v. Johnson*, Appendix B. 1, *et seq.*).

At the date of the *Johnson* opinion, June 19, 1970, the Petitioner's petition for such rehearing was pending. On July 1, 1970, two days after the *Johnson* opinion came to counsel's attention, a motion was made for leave to file a supplemental memorandum based on the *Johnson* case at a time when, counsel was informed, the en banc suggestion was still under consideration. The order denying the petition for rehearing bears a filing date of July 1, 1970; the letter advice that no Judge in active service had recommended hearing before the full Court is dated June 30, 1970. Both were received by counsel after July 1st.

I.

On trial, the Government conceded that the Securities and Exchange Commission investigators pursued the search of Parkwood's records after the petitioner had appeared before an Examiner in response to a subpoena duces tecum issued to him personally and reserved the privilege accorded him by Section 22(c) of the Securities Act of 1933. To the argument that prosecution was barred because of the exposure compelled by the subpoena, the Government smoked the atmosphere with the assertion that only Parkwood was examined and that Parkwood had no Fifth Amendment rights.

In this way the Government successfully avoided confrontation with explicits. Every lawyer, prosecutor or otherwise, is familiar with the procedure involved where a person under interrogation avails himself of his Fifth Amendment rights. There, he laboriously spells out his rights in response to each question. This is not the case where the privilege is claimed pursuant to Section 22(c) of the Securities Act. He says it once and there is "amnesty".

15 U.S.C.A. Sec. 77v(c):

Edwards v. U.S., 312 U.S. 473, 85 L.Ed. 957, Sup. Ct. of U.S. (1941)

The Securities Act provision is simple and clear. It provides:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

In the *Edwards* case, *supra*, the petitioner complained of a judgment of conviction after a plea in bar grounded in the reservation provided for by the statute. Under duress of subpoena, he had produced books and records of various trusts and organizations whose securities were the subject matter of the prosecution and reserved his rights. Sustaining the plea, the Court said (312 U.S. at p. 479):

> "The Government challenges the sufficiency of the plea in bar to show petitioner's claim to the benefit of the amnesty of §22(c). It suggests that the excerpt set out in the third paragraph of this opinion shows only that testimony was given concerning 'petitioner's identity and relationship' to the organizations whose securities the indictment charges petitioner fraudulently sold; that 'other matters' testified to are not specified nor the 'nature' of the testimony concerning them or his personal records.

> But the allegations of the plea are not to be weighed separately. Petitioner's identity and his relationship to the trusts alleged to have been created by him as a part of the fraudulent scheme are of primary importance in the proof of his criminality. This is quite different from the testimony in *Heike v. United States*, a prosecution for fraud on the revenue in weighing imported sugar. There former testimony in a Sherman Act proceeding related to official connection with a company involved and also a table showing the amount of sugar handled by the company, and a claim for amnesty was denied because the evidence 'neither led nor could have led to a discovery of his crime.' Certainly had petitioner given evidence of his creation of the organizations which the indictment says were part of his artifice it might easily have led to discovery of his trickery."

The point needs no elaboration. Where an individual is forced after reservation, to "produce evidence, documentary or otherwise" which identifies him with the evidence the Government gains, the individual gains amnesty "for or on account of any transaction, matter or thing" the evidence tends to prove.

The Court of Appeals proceeded on a theory entirely at odds with the Statute and *Edwards*. First, the Court said, the Petitioner refused to testify but did produce the corporate records. Secondly, the Court said that since the plea of self-incrimination was honored and the Petitioner did not give testimony he acquired no immunity. Thirdly, the Court said, Petitioner had no right to refuse to produce corporate records. Fourthly, the Court said, immunity accrues only when a witness invokes the privilege and is compelled to testify or produce personal records.

The foregoing statements are at variance with the principle of the statute.

A witness subpoenaed has no choice. He *must* testify; he *must* produce records, no matter whose they are. Once it is shown that the witness either testified or produced

records, the only question is: Did the witness reserve his rights?

The *White* case, cited below, has nothing to do with the statute involved in this case. There the question was whether a union official could be compelled, by contempt proceedings, to produce union records before a grand jury. In *Abrams*, cited below, the Commission handled the interrogation in Fifth Amendment fashion, a departure from the prescription of Section 22(c) of the Securities Act (Cf. *U.S. v. Goodner*, 35 F.Supp. 286).

Edwards describes the statute as an amnesty law. *Edwards* and the statute represent the doctrine and the only way to halt the proliferation of the error of *Abrams* and the rule of the instant case is by restatement of *Edwards*.

II.

For a number of years, the Court of Appeals for this Circuit has taken cognizance of a constitutional problem arising under the Fifth and Sixth Amendments. The problem stems from undue delay between the event complained of and formal charge.

> *Hanrahan v. U.S.*, 121 U.S. App. D.C. 134, 348 F.2d 363, C.A.D.C. (1965);
>
> *Ross v. U.S.*, 121 U.S. App. D.C. 233, 349 F.2d 210, C.A.D.C. (1965);
>
> *Hood v. U.S.*, 125 U.S. App. D.C. 16, 365 F.2d 949 C.A.D.C. (1966);
>
> *Lee v. U.S.*, 125 U.S. App. D.C. 126, 368 F.2d 834 C.A.D.C. (1966);
>
> *Woody v. U.S.*, 125 U.S. App. D.C. 192, 370 F. 2d 214 C.A.D.C. (1966).

Hanrahan, supra, was a mail fraud prosecution upon which there had been an indictment in Puerto Rico in July, 1959. In October, 1960, the Government brought about dismissal and reindicted on essentially the same charge

seventy-six weeks later. Thirteen months afterwards, the defendants were convicted. The unusual delay induced the Court of Appeals to remand for the following inquiries and decision (121 U.S. App. D.C. at p. 139):

> "If the court should find that all the delay attributable to the prosecutor was necessary for fair and just prosecution of the charge of mail fraud, then the convictions will stand. If, on the other hand, the court should find that the prosecution was conducted with such disregard of appellant's interests that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay,' then appellants' Sixth Amendment rights have been denied and the convictions must be vacated and the indictments dismissed. Finally, if no constitutional violation is found, but unnecessary delay under Rule 48(b) is present, then the decision whether to vacate and dismiss lies within the sound discretion of the trial court. In exercising that discretion the court should consider the prejudice resulting from possible loss of evidence as well as the hardships appellants might have suffered by reason of the delay in the prosecution."

In *Ross v. U.S.*, *supra*, the defendant was tried on narcotics charges. He complained that no complaint was sworn out for seven months after the alleged offense. The line of reasoning developed was different from the rationale of the earlier cases; the Court said that the case presented "a question akin to a Fifth Amendment due process issue". At all events, the Court dug deeply into the issue for, as it said, drawing on an earlier case (121 U.S. App. D.C. at p. 234):

> "the statute of limitations is not the sole standard by which delay between offense and complaint is to be measured."

The reversal of conviction rested on broad policy grounds—the need for protecting the citizen against the damage done by the slippage of time.

In the *Hood* case, *supra*, an appeal from conviction of robbery and in the *Lee* case, *supra*, a narcotics prosecution, the Court footnoted the problem, finding neither complaint crucial. On the other hand, the tenor of the footnotes discloses genuine concern for the positive harm potential. The note to *Hood* reads in part (125 U.S. App. D.C. at p. 17):

> "It is also claimed that a Sixth Amendment right to a speedy trial was denied appellants. This is founded upon the fact that 106 days elapsed between the offense and indictment, and 51 days between indictment and trial. As to the latter * * * we do not think that this interval warrants special notice. The earlier delay gives greater concern, particularly since the Government seems at a loss to account for it."

In *Lee*, *supra*, the footnote reads in part (125 U.S. App. D.C. at p. 127):

> "The conclusion upon remand that the delay was justified by the necessities of good police administrations seems very dubious indeed. The testimony followed the familiar pattern that delays, as here, of as much as 5½ months are necessary because there are no other ways of doing these things. But the police testimony was that, in planning and managing these undercover operations, no account whatsoever was taken of a defendant's interest in being apprised quickly of what he is charged with having done."

In the *Woody* case, *supra*, outright reversal of a conviction was voted, after remand to inquire into the reasonableness of a four month delay between event and arrest. Chief Judge Bazelon voted to reverse partly because of the "absence of police efforts to reduce the prejudice" (125 U.S. App. D.C. at p. 195). Judge McGowan found prejudice in the loss, through death, of a potential witness for the de-

fense and in the additional fact that another potential witness for the defense was lost because he had been arrested shortly before trial and could not testify without incriminating himself in his own case.

The extreme case is Petition of *Provoo*, 17 F.R.D. 183, aff'd 350 U.S. 857, 100 L. Ed. 761 but constitutional questions do not need extreme fact situations to support them. In the *Hanrahan* case, *supra*, the Court of Appeals held that the mandate of the Sixth Amendment required the Government to negate its own negligence or inefficiency and affirmed *sub nom Tynan v. United States*, 126 U.S. App. D.C. 206, 376 F.2d 761, only after a satisfactory showing on remand.

Contrary to the stated belief of the Court of Appeals, the record in the case at bar does not show that the

> "prosecution of the Appellant resulted from an extended investigation into the complicated and tangled affairs of the appellant and his corporations".

The record demonstrates that the Government was fully informed of the facts by October 6, 1964 (Deft's Exh. 2, App. pp. 302, 303), and prosecution became possible only when Mother Aquin Gilles, who made the statement in 1964, gave testimony contrariwise in 1968.

III

Petitioner briefed the Court of Appeals at considerable length on the Allen charge question (*Allen v. U.S.*, 164 U.S. 492, 41 L. Ed. 528). The Court was informed of counsel's objection to the instruction on trial, and was told of the undoubted dynamic effect on a confused group of jurors. The argument was dismissed in a single sentence on the authority of *Fulwood v. United States*, 125 U.S. App. D.C. 183, 369 F.2d 960, cert. den. 387 U.S. 934.

Sixteen days after the Petitioner's case was decided and while a petition for rehearing en banc was still pending, the identical panel published the *Johnson* opinion (Appendix B. 1, *et seq.*). Judge McGowan, writing for the majority, raised

the broad policy question of eliminating, from the standard instruction,

> "the references to a deference owed by a minority to a majority. * * * it is the one (element) which has widely been thought to contain the true dangers to free and unfettered exercise of individual judgment and expression of conscience which is at the very core of the jury system." (Appendix B. 12)

The *Fulwood* case was not considered decisive as, among other things, the jury did not immediately reconvene after the charge was given. Decisive or not, Judge McGowan considered it more "responsible to the tradition" of the Court for any reconsideration of *Fulwood* to be en banc.

On the Petitioner's trial, the Trial Judge gave the charge after the Jury had advised the Bench "Verdict Impossible", later stating for the record that the instruction had been taken from *Commonwealth v. Tuey* (8 Cush. 1). Unlike the situation in *Fulwood*, where the jurors "were free to ponder on the supplemental charge apart from their fellow jurors for approximately 18 hours", the Jury resumed deliberations and returned a verdict in less than an hour.

It takes no extensive review to make it clear that the Allen charge has been a source of contention in the cases. In Arizona, for example, it's Supreme Court finally decided that the charge had caused so much trouble, there would be no more of it in that State's Courts.

State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959).

In the language of decree the Court said (342 P.2d at p. 200):

> "This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.

> "It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with various facts and circumstances and welded with everchanging personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security. We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court."

The cases in the Federal Courts make four points stand out. The first is that if there is anything coercive in the instruction itself, the judgment may not stand. The second is that if there is departure from the four corners of the Allen charge, the judgment must be reversed. Thirdly, if there is a stress situation, the injection of the charge will avoid the result. Lastly, one Circuit Judge has filed well considered opinions demanding abandonment of the practice on grounds of unwarranted intrusion into the jury room.

The first point is clear enough from *U.S. v. Harris*, 391 F.2d 348, C.A. 6 (1968). There, the trial court told a deadlocked jury that the case had been tried before and that

> "'this lawsuit must be decided—it must be decided at some time by some jury, which just means that if you are unable to decide this lawsuit that we are going to have to declare a mistrial and we have to then call in twelve more jurors and try this case again.'" (391 F.2d at p. 354)

To the claim that the charge was *per se* coercive, the Court said (391 F.2d at p. 355):

> "We agree. In the first place, the statement is not completely accurate. The possibility of disagreement by the jury is a part of the jury system. Green v. United States, 309 F.2d 852, 856; Williams v. United States, 119 U.S. App. D.C. 190, 338 F.2d 530, 533; Thaggard v. United States, 354 F.2d 735, 740 (concurring opinion). It is conceivable, of course, that in a given case it might never be possible to obtain a unanimous verdict of either acquittal or guilt.

> "The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right except in impeachment cases to remain free from the stigma and penalties of a criminal conviction until he has been found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury. It was said in Keerl v. State of Montana, 213 U.S. 135, 138, 29 S. Ct. 469, 470, 53 L. Ed. 734 (1909) that both the Fifth and Fourteenth Amendments invest courts of justice with the authority to discharge a jury from giving any verdict whenever, in the court's opinion, there is, after due time for deliberation, 'a reasonable probability that the jury could not agree.'"
>
> * * *
>
> "We think the supplemental instructions in this case go too far. A previous jury had failed to agree; this jury had reported itself as deadlocked; the supplemental instructions were given and within a short time a verdict was reached. It is a reasonable conclusion that the minority was influenced by the instructions to subordinate its will to the will of the majority."

The second point is scored in opinions such as Judge Wisdom's in *Green v. U.S.*, 309 F.2d 852, C.A. 5 (1962), where the jury had been told on the trial (309 F.2d at p. 855):

> "'* * * it is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority * * *.'"

This instruction brought strong reaction.

> "There is no legal rule that the minority merely because they are in the minority, should distrust their own judgment. Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority's views without full discussion and without regard to the historical right of a single juror to stick to his conscientious opinions of the case." (*Id.* at p. 855)

Of special consequence here, is the third class of cases.

> *Jenkins v. U.S.*, 380 U.S. 445, 13 L. Ed. 2d 957, Sup. Ct. of U.S. (1965);
>
> *Williams v. U.S.*, 119 U.S. App. D.C. 190, 338 F.2d 530, C.A.D.C. (1964).

The *Jenkins* case, *supra*, was tried in the District Court for the District of Columbia where the accused had been indicted for robbery and for assault with intent to rob. He was convicted of robbery and acquitted on the assault charge.

Just over two hours after deliberations began, the jury advised the Court it was unable to agree on both counts because of insufficient evidence. The "blast", as the cases say, took the form of

> "You have got to reach a decision in this case."

It was not only the words this Court questioned; the case was reviewed to determine if the instruction was coercive "in its context and under all the circumstances". The decision was brief (380 U.S. at p. 446):

> "Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it."

In *Williams, supra*, it developed, after five hours of deliberation, that the jurors were unable to agree. The jury returned to the Court and asked if the alternates could replace the minority in the balloting. After ascertaining that there was a "clear minority", the trial judge gave the Allen

charge—with some questionable variation—and the jury came back with a quick verdict.

Judge Wright, for the Court, said that the quick verdict was "not surprising" (119 U.S. App. D.C. at p. 193):

> "It would indeed take a strong-willed juror to maintain his position under this type of pressure.
>
> "Whatever may be said for the continuing validity of the often criticized Allen charge, even in its pristine formulation, unquestionably the supplemental charge given to these two dissenting jurors is impermissible. There is nothing in the Allen charge which tells a juror that he should not go "to the jury room with a blind determination that the verdict should represent his own opinion.' Nor is there any 'legal rule that the majority of jurors have better judgment than the minority.' Green v. United States, supra Note 1, 309 F.2d at 855. Indeed, a mistrial is as much a part of the jury system as a unanimous verdict.
>
> "In view of the possibly coercive effect on the jury of the supplemental charge given in these circumstances, appellant's conviction may not stand."

In the Fifth Circuit, there have been two notable dissents in Allen charge cases, in each of which the dissenter advocated that the charge be written out of Federal trial practice. In those cases, the affirming majority made note of the lack of objection to the additional instruction, distinguishing them from the case at bar where counsel advanced strong reasons for discharging the Jury instead of directing them to resume deliberations with Allen the counsellor.

Huffman v. U.S., 297 F.2d 754, C.A. 5 (1962)

Walker v. U.S., 342 F.2d 22, C.A. 5 (1965)

In *Huffman, supra*, Judge Brown, in dissent, listed thirteen different pressures in the instruction, which we may fairly sum up in one word—expediency. At the core of his distress was the conviction that the charge strikes at the vitals of the jury system. His opinion reads in part (297 F.2d at p. 759):

"This is not a free jury. Done with more finessee and sophistication, the practical effect of the charge is the same as the now historically discredited coercive power of the Judge over the jury when the verdict displeased the Judge. The strength of the jury system is its absolute, real actual independence. It must take its instruction on the law from the Judge, but the jury alone determines the facts. It is simply not legally correct that some jury must sometime decide that the defendant is 'guilty' or 'not guilty.' The fact is, as history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful, vital function in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured.

"The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge. For good reasons it has acquired its descriptive as the 'dynamite charge' (variously called the 'nitroglycerin charge') at the hands of the Bar. This is an intrusion by the Judge into the exclusive domain of fact finding by the jury. It is nonetheless so merely because the Judge does not indicate which of two decisions must be reached.

"What is worse, it is becoming more and more commonplace. Nearly every hard-fought criminal case coming to the Court reveals the Judge sooner or later giving this charge, or some embellishment of it. Too often, as in these two cases, it was but a matter of a few hours after the jury had retired to deliberate. And not infrequently, as we were led to believe on oral argument in both of these cases, it occurs with the last jury in the last case at that Division point for that particular term. To the other pressures which are irrelevant is the other and natural one of a personal consideration for the Judge who, like the jurors, also want to go home. The

charge pointedly reminds them that to hold out disrupts the plans of all.

"I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise. In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence.

"The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great." (Italics in original.)

Something that did not escape Judge Brown's attention was the not infrequent occurrence of the Allen charge and its attending problems on the last day of the term of court. We repeat what we said before. In the instant case, the day of charge and verdict was the final day of the Jury's service.

Judge Brown restated his opposition in the *Walker* case, *supra*. He concluded by saying (342 F.2d at p. 28):

"It was the Judges who first thought up the idea of the dynamite charge. It ought to be the Judges who put an end to it in a quick and not too decent burial.

"And in these rites, for the requiem I would take the words of Mr. Justice Clark speaking, not ex cathedra, but rather as Chairman of the Joint Committee for the Effective Administration of Justice delivered on the fiftieth annual meeting of the American Judicature Society, August 14, 1963, in the report of that Joint Committee under the title

'Progress of Project Effective Justice.' Reporting on the state and regional judge seminars, he first said:

> "'Our seminars do not attempt the transformation of the judge into a mechanical genius. We do not use Lee Loeving's gadget "jurimetrics." Science may reach the moon but it will never reach the jury. It still takes more than "symbolic logic" to do that. It takes an effective counsel with a competent judge presiding.'"

"The Justice then concluded:

> 'Nor do we circulate the "Allen charge" to the new judges as I used to do when heading up the criminal division in the Department of Justice. Allen is dead and we do not believe in dead law.'"

With all their years of experience, the courts have been able to do little with the Allen charge beyond insisting that trial judges confine themselves to its letter. None yet has been able to develop a clear principle telling trial judges when they may or may not exert its pressure. This inability led the Supreme Court of Arizona, in *State v. Thomas*, *supra*, to forbid its use.

Unmistakably, the charge is a pressure device, for it is addressed to a faction of the jury. It was in this context that the Court of Appeals, in *Johnson*, suggested consideration, en banc, to the end that a policy might be adopted which would expunge the pressure aspect.

One guide, favorably received by the *Johnson* panel, was the American Bar Association's recommended standard. An instruction, patterned after the recommendation, "may free a jury mired in irrelevant disagreement" and still be "relatively free of potentially coercive references", protecting "proponents of a minority view". (Appendix, B. 10.)

Two forms of instruction apparently in actual use (Appendix, B. 11, 12), inform the jurors but each remains a free being, unweighted by the thought that anything other than personal conscience and his own reasoning go into his vote.

At the birth of the Allen charge in Federal practice, Mr. Justice Brown, speaking for this Court (164 U.S. at p. 494) confessed embarrassment "by the absence of a brief on behalf of the plaintiff in error". Perhaps, for the absence of an adversary, seventy-four years of uncertainty have been the consequence. At all events, the circuits have been many times disturbed.

In 1969, the Seventh Circuit, in *United States v. Brown*, 411 F.2d 930, adopted the American Bar Association's standard. If *Fulwood* is the standard in the District of Columbia Circuit, there is clear conflict. The instant case, with specific objection by trial counsel in the record, affords the opportunity to settle the conflict or establish a new standard to "avoid recurring controversies, turning upon subtle questions of coercion in the context of each case." *United States v. Johnson* (Appendix, B. 14).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

F. Joseph Donohue

Theodore Kligman

Of Counsel:

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503 D Street, N.W.
Washington, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,756

UNITED STATES OF AMERICA

v.

VICTOR J. ORSINGER, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Decided June 3, 1970

Messrs. F. Joseph Donohue and *Theodore Kligman* for appellant.

Mr. Robert W. Ogren, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery*, United States Attorney, *John A. Terry*, *Seymour Glanzer*, Assistant United States Attorneys, *William P. Sullivan* and *Miss JoAnne LeVeque*, Attorneys, Securities and Exchange Commission, were on the brief, for appellee. *Mr. Roger E. Zuckerman*, Assistant United States Attorney, also entered an appearance for appellee.

Before McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*.

ROBB, Circuit Judge: The appellant was indicted in fifteen counts. Counts one, two and three charged fraud by wire

(18 U.S.C. §1343), counts four and five, mail fraud (18 U.S.C. §1341), count six, interstate transportation of a check taken by fraud (18 U.S.C. §2314), and counts seven through fifteen, larceny after trust (22 D.C. Code §2203). A jury acquitted the appellant on the first six counts but found him guilty on the nine counts charging larceny after trust, in that he fraudulently converted to his own use $1,150,000 entrusted to him by The American Province of the Sisters of the Divine Savior. He was sentenced to imprisonment for not less than three nor more than nine years on each count, the sentences to run concurrently.

I

All of the offenses charged in the indictment were alleged to have occurred in 1963. In that year, and for some years before, the appellant was a lawyer and real estate man with offices in the District of Columbia. The charges against him had their origin in certain transactions between him and The American Province of the Sisters of the Divine Savior. This organization, a non-profit corporation, was a religious order devoted to nursing, teaching and all forms of charitable work. The projects of the Order were financed by the salaries of the Sisters, by donations, and at times by borrowing of public funds.

The Sisters' public borrowing led to a meeting in May 1962 between the Provincial Superior of the Order, Mother Aquin Gilles, and the appellant. The meeting was arranged by representatives of the Superior Generalate, the Order's parent organization. As a result, the appellant, who was experienced in the financing of religious organizations and was well known to the Superior Generalate, arranged a refinancing of the debts of The American Province. The refinancing was accomplished through a public bond issue underwritten by Keenan & Clarey, a Minneapolis firm specializing in the underwriting of unsecured bonds of religious

organizations. The appellant acted as attorney for the Sisters in this matter, but was not compensated for his services. Mother Aquin testified that on one occasion when she mentioned compensation the appellant "said he would not accept any fees", that he "wanted to do this for the Sisters and I never again asked him to remunerate him for his services."

Having arranged refinancing for the Sisters in the fall of 1962 the appellant continued as their legal counsel and financial advisor. They discussed with him a desire to replace or remodel a hospital in Wausau, Wisconsin and a nursing home at Portage which they maintained. This discussion led to a suggestion by the appellant that the necessary funds be obtained through a bond issue, to be arranged through Keenan & Clarey. Mother Aquin testified that on or about May 16, 1963 after many discussions

> "* * * I met with Mr. Orsinger, and at that meeting the crystallized form of our proposals were put together and those proposals included taking out a bond issue in the amount of two and a half million dollars of public funds through Keenan and Clarey, and one million dollars of that amount of money would be put in a reserve fund to begin work on Wausau and Portage at such time as we were able to begin and one million and a half was to be entrusted to Victor J. Orsinger for the purpose of assembling a block of property in the Marquette University area on which the Sisters of the Divine Savior would build a house of studies for our young sisters.
> * * *
> "The proposal was made that it [$1,500,000] was to be entrusted to Mr. Orsinger through his attorney account and then through that into Parkwood out of which it would be disbursed for the purpose of assembling a block in the Marquette area.
> * * *
> "* * * the Sisters of the Divine Savior had entrusted, I mean, were entrusting, one and a half million dollars to Victor J. Orsinger on his own word. It was to be paid into his attorney account and then through Parkwood,

> Incorporated, he would buy this block * * * but we were not giving it to Parkwood as Parkwood. We were giving it, we were entrusting it to Mr. Orsinger for this assembly of the block for us. * * *".

"Parkwood", referred to by Mother Aquin, was Parkwood, Incorporated, a real estate investment and holding company entirely owned by the appellant.

Mother Aquin testified further that in their meeting in May 1963 the appellant advised the Sisters to acquire an entire block rather than the one-third of a block needed for their project, so that "the part not used by the Sisters would not be used then for any purpose incompatible with a house of studies in this area". The appellant estimated that it would take about two years to assemble the entire block, and according to Mother Aquin he represented that "the Sisters at the end of the two-year period would receive one-third of the block back from Mr. Orsinger, and the $1,500,000 that we had entrusted to him for the purchase of the property", the one-third to be free and clear of all mortgages and encumbrances. The appellant wrote out a summary of his proposal, which included the statement with respect to the disposition of the funds he was to receive: "$1,500,000 to Victor J. Orsinger for purchase of Marguette Univ. area block, to be secured by mortgage on land purchased. 10% interest for year, i.e., $300,000 for 2 years deposited in escrow in beginning." About a week later, around May 22, 1963, the appellant telephoned Mother Aquin and "suggested that the bond issue be raised to $3,000,000 and that the extra $500,000 would be a temporary loan for a (sic) generalate in Rome, and, that would be repaid for us from a bond issue that the generalate would take out later". The appellant's suggestion was adopted, and the amount of the bond issue was increased to $3,000,000.

Early in June the appellant went to Milwaukee to discuss the proposed bond issue and purchase of land. At this time he asked Mother Aquin "if we would give him a $50,000

advance payment so that he could begin the assembly of the block near Marquette". On June 12, 1963 Mother Aquin sent the appellant her organization's check for $50,000 with a covering letter describing it as "the check of $50,000 as advance payment of money needed for the project in the Marquette area". The check was payable to the order of Victor J. Orsinger, Attorney, and was endorsed by him and deposited in the account of Parkwood, Incorporated. By letter dated June 14, 1963 he acknowledged "receipt of the $50,000 advance payment sent by you today as part of the $1,500,000 required for the Marquette area project." On the same day, June 14, 1963, Orsinger wrote to Mother Olympia, Superior General of the Sisters of the Divine Savior in Rome. Referring to the arrangements for a $3,000,000 loan and the disposition of the funds raised he said:

> "$1,500,000 will go to Orsinger for purchase of land for the Juniorate near Marquette University. Orsinger will pay the entire cost of this bond issue for two years, namely $150,000 a year. The details of our memorandum of May 16, 1963 have not been changed except to raise the amount from $2,500,000 to $3,000,000.
>
> * * *
>
> "Simply stated, (cf. Memorandum, May 16, 1962), the Sisters will receive the land they need for the Juniorate in Block No. 2, free and clear, at no cost, plus their $1,500,000 back at the end of two years and I would retain the rest of the land in the block."

Noting that $500,000 of the borrowed funds would go to Rome, he added

> "You should receive your $500,000 some time around August 1, 1963. Since I am paying the interest costs on this $500,000 also, do you think this $500,000 would take the place of the principal I am supposed to send you in 1963. (Cf. My Memorandum of January 16, 1963.)"

It appeared that the appellant was heavily indebted to the organization in Rome and that substantial payments on his loan were due in 1963.

On June 27, 1963 the Sisters and Orsinger executed a "Memorandum of Agreement" prepared by Orsinger. Mother Aquin signed for the Sisters, and Orsinger signed as "Victor J. Orsinger, Attorney" and "Victor J. Orsinger, President" of Parkwood, Incorporated. The agreement recited that the Sisters "have decided to borrow three million dollars", that "Orsinger, as special legal counsel to the Sisters for this purpose, has assisted the Sisters in arranging this borrowing", that "Parkwood is a real estate corporation, all of whose common stock is owned by Orsinger", and that the agreement was intended to be a "convenient memorandum of the purposes and dispositions of the borrowed funds". The agreement provided for the disbursement of the "$3,000,000 borrowed by the Sisters" at 5% interest, as follows:

> "(a) $1,500,000 to Victor J. Orsinger, Attorney, for the purposes described herein;
>
> "(b) $500,000 to the General Council, Sisters of the Divine Savior, Rome, as a temporary loan to be repaid out of 1964 borrowings of the General Council or from other sources;
>
> "(c) $1,000,000 to the Sisters as a reserve fund, which may be reinvested by the Sisters, pending commencement of new building projects in Milwaukee, Wausau, and Portage."

For his part, Orsinger agreed to exert his best efforts and skills "to purchase in his own name or in corporations owned and controlled by him ground" in Milwaukee for the Sisters' Juniorate residence. The agreement further provided:

> "For record-keeping and tax-accounting purposes the above-recited $1,500,000 shall be paid to the account of 'Victor J. Orsinger, Attorney', and he shall then disburse it through Parkwood, Incorporated, as required. Therefore, Parkwood, Incorporated, shall issue its promissory note for $1,500,000 due within two years as security for the purposes recited here, which note shall provide for the prompt payment, in semi-annual installments, of interest at the rate of Ten Per Cent (10%) per annum, that is, One Hundred Fifty Thou-

sand Dollars ($150,000) each year while the said note is unpaid and outstanding (so that the total interest charge on the entire Three Million Dollars ($3,000,000) loan shall be paid from the above interest payments made by Parkwood), and further that Parkwood shall reserve such interest in advance by segregating and depositing from its funds the sum of Three Hundred Thousand Dollars ($300,000) in a national bank so that the interest payments will be available when due."

Orsinger also agreed to pay two-thirds of the expenses incident to the placement of the $3,000,000 loan, these expenses being estimated at $111,364 so that Orsinger's share was $74,243. He further agreed that he would charge no legal fee or make any claim for expenses in connection with the placement of the loan or the purchase of the land.[1]

---

[1] The full text of the Memorandum of Agreement was as follows:

"Made this 27th day of June, 1963, by and between SISTERS OF THE DIVINE SAVIOR, Milwaukee, Wisconsin (hereinafter called 'Sisters'), and VICTOR J. ORSINGER, 816 Connecticut Avenue, Washington 6, D. C. (hereinafter called 'Orsinger'), and PARKWOOD, INCORPORATED, 816 Connecticut Avenue, Washington 6, D. C. (hereinafter called 'Parkwood')

"WITNESSETH, that

"WHEREAS, the Sisters, acting through their Provincial Council, have decided to borrow Three Million Dollars ($3,000,000), by separate instrument, for those general purposes recited herein, such borrowing being ecclesiastically approved as an unsecured general credit obligation, and

"WHEREAS, Orsinger, as special legal counsel to the Sisters for this purpose, has assisted the Sisters in arranging this borrowing, and

"WHEREAS, Parkwood is a real estate corporation, all of whose common stock is owned by Orsinger, and

"WHEREAS, it is intended, by this writing, to have a convenient memorandum of the purposes and dispositions of the borrowed funds, without affecting hereby the unrestricted power of the Provincial Superior and her Council to modify;

The Sisters' public offering was made on July 1, 1963. On July 3 they transferred $450,000 from their account in Milwaukee to the account of "Victor J. Orsinger, Attorney" in the Maryland National Bank. On July 8 Mother Aquin

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change or abandon at any time the purposes and dispositions recited herein; nor does this writing change or affect the Sisters' legal obligation on the separate loan indenture; nor does this writing change or affect any obligations of others, including Orsinger, to the Sisters.

"NOW, THEREFORE, be it remembered that

"1. The $3,000,000 borrowed by the Sisters, through Keenan and Clarey, Inc., Minneapolis, Minn., upon a coupon note issue due September 1, 1968, which issue provides, *inter alia*, payments of interest only in semi-annual installments at the rate of Five Percent (5%) per annum, shall be disbursed as follows:

"(a) $1,500,000 to Victor J. Orsinger, Attorney, for the purposes described herein;

"(b) $500,000 to the General Council, Sisters of the Divine Savior, Rome, as a temporary loan to be repaid out of 1964 borrowings of the General Council or from other sources;

"(c) $1,000,0000 to the Sisters as a reserve fund, which may be reinvested by the Sisters, pending commencement of new building projects in Milwaukee, Wausau, and Portage.

"2. Orsinger agrees to exert his best efforts and skills

"(a) to purchase in his own name or in corporations owned and controlled by him ground (with or without buildings) in one of those certain city blocks in Milwaukee selected by the Sisters for the purpose of assembling a suitable site for a Juniorate residence.

"(b) All such purchases, contracts, mortgages, etc. shall be at the complete risk and liability of Orsinger or his said corporations; and no liability, direct or indirect, shall attach to the Sisters by virtue of this activity, and none shall be inferred from the prospective beneficial interest which the Sisters may receive as a fruit of this activity.

"(c) For record-keeping and tax-accounting purposes

sent the appellant the Sisters' check for $925,757 drawn to the order of "Mr. Victor J. Orsinger, Attorney". In her covering letter she specified that the money was "to be used for the project in the Marquette area". The total of these

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the above-recited $1,500,000 shall be paid to the account of 'Victor J. Orsinger, Attorney', and he shall then disburse it through Parkwood, Incorporated, as required. Therefore, Parkwood, Incorporated, shall issue its promissory note for $1,500,000 due within two years as security for the purposes recited here, which note shall provide for the prompt payment, in semi-annual installments, of interest at the rate of Ten Per Cent (10%) per annum, that is, One Hundred Fifty Thousand Dollars ($150,000) each year while the said note is unpaid and outstanding (so that the total interest charge on the entire Three Million Dollars ($3,000,000) loan shall be paid from the above interest payments made by Parkwood), and further that Parkwood shall reserve such interest in advance by segregating and depositing from its funds the sum of Three Hundred Thousand Dollars ($300,000) in a national bank so that the interest payments will be available when due.

"(d) On or about July 1, 1964, the Sisters and Orsinger shall meet to discuss the progress of the purposes herein intended, and at that time (whether or not such a meeting and discussion are actually held) the Sisters may confirm, alter, amend, modify or completely abandon all or any part of the purposes delegated to Orsinger, without further liability to any parties who may be thereby affected, directly or indirectly, except that any such action by the Sisters shall not relieve Parkwood from its obligation under the exact terms of its $1,500,000 note or otherwise affect the said note unless all of the parties hereto shall agree in writing that the said note shall be modified, renegotiated or cancelled.

"(e) It is recognized that there are certain expenses incurred by the placement of the Sisters' Three Million Dollars ($3,000,000) loan, listed in the underwriting agreement with Keenan & Clarey, Inc., as 'Costs of Making Loan'. These expenses are estimated at $111,364.00.

two checks, together with the $50,000 "advance" previously sent to the appellant, and $74,243, the appellant's share of expenses of the public offering, is $1,500,000.

In accordance with the agreement of June 27, 1963 that "Parkwood, Incorporated, shall issue its promissory note for $1,500,000 due within two years as security for the purposes recited here" the appellant gave the Sisters Parkwood's note for $1,500,000, signed by him as President. The

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Parkwood hereby agrees to pay two-thirds (⅔) of the actual costs, or approximately $74,243.00.

"(f) Orsinger shall charge no legal fee or make any claim for expenses in connection with the placement of this loan or the accomplishment of the purposes outlined herein.

"(g) If, in the course of accomplishing the above purposes, a building is purchased which is suitable as a temporary residence for the Sisters, Orsinger agrees that possession to such building in its then-present condition shall be delivered to the Sisters and that no rent or other charge shall be made for the use or occupancy of the property; i.e., the Sisters shall pay only the cost of utilities and such repairs or alterations which the Sisters may wish to make to the building.

"IN WITNESS WHEREOF the parties hereto have subscribed to this Memorandum on the day and date first above written.

/s/ Victor J. Orsinger
Victor J. Orsinger,
Attorney

PARKWOOD,
INCORPORATED

ATTEST:
/s/ Aubrey A. Arns

/s/ Victor J. Orsinger
Victor J. Orsinger,
President

ATTEST:

SISTERS OF THE
DIVINE SAVIOR

/s/ Sister M. Charline Shakleton

/s/ Mother Aquin Gilles"

note, payable on or before two years after its date of July 1, 1963, carried interest at the rate of 10% per year. It provided:

> "The Maker hereof agrees to segregate and deposit from its funds a sum equal to the total interest due on this obligation until maturity and such separate fund, although invested in government bonds or bank time deposits or cash, shall be diminished in proportion to, and only as, the interest payments required by this note are made."

The $1,375,757 received from the Sisters by the appellant and deposited in his attorney account was promptly transferred to the account of Parkwood or one of its wholly-owned subsidiaries. The money was then used to meet various obligations of the appellant and his companies. By the end of August there was only $8,200 in cash left in the "Victor J. Orsinger, Attorney" account and a $3,000 cash balance in the Parkwood accounts. During this period, however, disbursements for the acquisition of the Marquette property amounted to only $12,250. No money was escrowed or segregated for the payment of interest to the Sisters.

The record discloses that when he was dealing with the Sisters in 1963 the appellant and his corporations were in financial difficulties. Payments on loans and mortgages were delinquent and the appellant was struggling without success to obtain additional financing through commercial loans. The proof is that the appellant used the money obtained from the Sisters to meet these pressing obligations. Subsequently, he began the acquisition of the Marquette block with borrowed funds from other sources. By the end of 1963 seventeen properties were under contract out of a total of twenty-one properties in the block. By the end of 1964 twenty properties had been acquired or were under contract. By the end of 1965 the total cost of the property which had been acquired was $1,361,000, including real estate taxes, but the net cash outlay by Parkwood totaled only $410,000. Without telling the Sisters the appellant had mortgaged the property

for $890,000; and all except $100,000 of this money was used for the general operations of Parkwood.

In July 1964 officers of the Securities and Exchange Commission went to Milwaukee in connection with an investigation of the sale of church notes which had been sold as a result of an offering prepared by the appellant. At the same time the appellant, as attorney for the Sisters, appeared in Milwaukee to review the progress being made on the acquisition of the Marquette proerty. The agreement of June 27, 1963 provided for such a review. Mother Aquin testified that at this meeting "Mr. Orsinger presented a modification of agreement, that in view of the fact that all was proceeding as we had expected, that he would like to remove the money that had been kept in escrow to pay the interest as it came due." The modification presented by the appellant provided that the Sisters waive the requirement that interest payments be placed in escrow. Mother Aquin signed the modification agreement and the appellant signed as president of Parkwood and as "Victor J. Orsinger, Attorney". In fact, as the appellant knew, but did not disclose to Mother Aquin, he had never placed in escrow the money required for the payment of interest.

Mother Aquin did not learn until December 1964 that the appellant had mortgaged the Marquette block. At that time she asked the appellant if there were any mortgages placed on the property and "I was told that there were two mortgages placed on the property there in the amount between $100,000 and $200,000 and this was a very great surprise to me." She testified that the appellant explained "that money had been set aside in a trust company in Milwaukee and that there was no need to worry about the costs the payments would be made on it when they came due." In fact the mortgages exceeded $800,000 and only a small amount had been escrowed for payment.

Although a total of $250,000 in interest was paid to the

Sisters through March 31, 1965 they did not receive $1,500,000 on July 1, 1965. Parkwood was placed into insolvency proceedings in March 1966 and into bankruptcy in June 1966. Parkwood defaulted on the loans secured by mortgages on the Marquette block and judgments were obtained by the mortgagee.

II

The appellant argued in the district court that he was entitled to a judgment of acquittal upon the ground that there was no evidence that the Sisters "entrusted" their money to him "for the purpose of applying the same for the use and benefit" of the Sisters, within the meaning of the statute defining larceny after trust (D.C. Code 1967 §22-2203). Specifically, the appellant argued that the proof was that he borrowed the $1,500,000 from the Sisters, giving them an interest-bearing promissory note and thereby establishing a relationship of debtor and creditor, rather than one of trust; that as a borrower he had the right to use the money for his own purposes. Cf. *Fulton* v. *United States*, 45 App. D.C. 27 (1916). He pointed to the fact that entries in the Sisters' books, and a proof of claim submitted on their behalf in the reorganization proceedings, referred to the note as evidence of an obligation due to the Sisters. The appellant repeats these arguments in this court. The district court was not persuaded and neither are we.

Whether a transaction creates a trust relationship or that of debtor and creditor depends upon all of the facts and circumstances, including the intention of the parties. The fact that interest is to be paid is of course evidence that a debt is created as distinguished from a trust obligation, but it is not conclusive. There may be evidence that justifies a jury in finding that notwithstanding the payment of interest the recipient of the money held it in trust. *Commonwealth* v. *Snow*, 284 Mass. 426, 187 N.E. 852 (1933); *People* v. *Pierce*, 110 Cal. App.2d 598, 243 P.2d 585 (1952); *Stecher* v. *State*,

202 Wis. 25, 231 N.W. 168 (1930); *McGlynn v. Schultz*, 90 N.J. Super. 505, 218 A.2d 408 (1966). Here Mother Aquin, representing the Sisters, testified that in her discussions with the appellant he proposed that the Sisters entrust him with $1,500,000 for the purpose of assembling the Marquette block. There was no discussion of a loan or any mention of a loan by Mother Aquin or the appellant; on the contrary it was Mother Aquin's clear understanding and intention that the money was to be entrusted to the appellant for the sole purpose of purchasing land. The appellant asked for a "$50,000 advance payment so that he could begin the assembly of the block" and he acknowledged receipt of this money "as part of the $1,500,000 required for the Marquette area project". On the same day he wrote to the Superior General of the Sisters stating that "$1,500,000 will go to Orsinger for purchase of land for the Juniorate near Marquette University". The "Memorandum of Agreement" executed by the Sisters and the appellant on June 27, 1963 provided that $1,500,000 would go "to Victor J. Orsinger, Attorney, for the purposes described herein" and that "For record-keeping and tax-accounting purposes the above-recited $1,500,000 shall be paid to the account of 'Victor J. Orsinger, Attorney', and he shall then disburse it through Parkwood, Incorporated, as required". It is plain that the "purposes described" were the purchase of land in the Marquette block, and that the "disbursements required" were disbursements for such purposes, and not for the private purposes of the appellant. Consistently with this interpretation Mother Aquin, when she sent the appellant the Sisters' check for $925,757 on July 8, 1963, specified that the money was "to be used for the project in the Marquette area". Again, the appellant on cross examination admitted that on May 17, 1963, in discussing his application for a loan from the Maryland National Bank, he told a representative of the bank, Mr. Darnielle, that as counsel for the Sisters he was about to receive $1,500,000 from them, that this money was for the purchase of certain properties in Milwaukee, that he pro-

posed to place $300,000 of the money in a certificate of deposit at the Maryland National Bank, and that the balance of $1,200,000 would remain in a checking account, to be gradually disbursed as the properties were assembled in Milwaukee.

The appellant argues that the existence of a promissory note and his payment of interest negative the existence of a trust relationship between him and the Sisters and establish that the relationship was that of debtor and creditor. As we have said the existence of a promissory note and the payment of interest are not conclusive on this point. The jury was required to weigh the significance of the interest-bearing note in the light of all the surrounding facts and circumstances. Among such facts, in addition to those we have already mentioned, was the fact that although the Memorandum of Agreement of June 27, 1963, prepared by the appellant, referred to "borrowing" by the Sisters and to a "temporary loan" of $500,000 to the General Council, Sisters of the Divine Savior, it said nothing about a loan to the appellant or borrowing by him. If the transaction with the Sisters was a loan the appellant, an experienced lawyer, could have made this plain in the written agreement; indeed, as attorney for the Sisters it was his duty to do so. His failure to do so, coupled with the fact that there was no mention of a loan to him in his discussions with the Sisters, was evidence that there was no loan.

The appellant contends that "simple reasoning" leads to the conclusion that the appellant received a commercial loan from the Sisters, that there is no other credible explanation for the appellant's agreement to pay 10% interest a year on $1,500,000, and to confer other gratuitous benefits upon the Sisters. The jury might have believed from the evidence, however, that the purpose of the appellant's munificence, his offering of something for nothing, was not to make him a borrower but rather to induce the Sisters to part readily with funds which he might juggle for his own purposes.

Furthermore, the appellant's statement to Mr. Darnielle of the Maryland National Bank, in May 1963 before he received the Sisters' money, that he proposed to place $300,000 of the money in a certificate of deposit, suggested that he intended to pay them interest with their own money. Again, with respect to the motivation of the appellant's generosity, the jury was entitled to consider the fact that by arranging the public borrowing of $3,000,000 by the Sisters, which included $500,000 for the General Council in Rome, the appellant apparently hoped to relieve the pressure on himself to repay money that he owed to the General Council.

The jury was not bound by the entries in the Sisters' books referring to the appellant's note as an obligation due to the Sisters. The evidence disclosed that these entries resulted from a question to the appellant by Sister Fotina, Treasurer of the Order, who asked the appellant how the note "should be set up on the books". In response the appellant gave her a memorandum listing the note as a "receivable". Sister Fotina relied upon the appellant's advice in recording the transaction in her books, and this version of the matter carried over into the Sisters' claim in the reorganization proceedings.

In determining the true nature of the transaction between the Sisters and the appellant the jury was also entitled to consider the evidence that when he received the Sisters' money the appellant and his corporations were in straitened if not desperate circumstances. The appellant himself characterized his cash position at the end of May 1963 as a "distress situation". He had attempted without success to obtain financing through commercial loans, so that he might make good on defaults and stave off threatened and imminent foreclosures. In the circumstances any loan to him would have been risky and virtually unsecured. Although he was acting as their attorney and financial advisor he made no disclosure of these facts to the Sisters.

If the appellant was to receive the Sisters' money as a loan, then as their lawyer he was bound to make full disclosure to them. It is elementary that the relationship between an attorney and his client, being one of the highest trust and confidence, requires the attorney to act in the utmost good faith and candor, to be completely fair and frank with the client, and to take no advantage of the confidence reposed in him. In the light of this legal and ethical compulsion upon him to reveal all material facts if a loan to him was involved in his discussions with the Sisters, the appellant's silence was doubly significant, and was persuasive evidence that no loan was contemplated or made. Moreover, in considering the appellant's conduct after he obtained the Sisters' money, the jury might well have believed that his duplicity and falsifications concerning the escrow fund and the mortgages on the Marquette block were inconsistent with an honest belief on his part that he was a borrower free to handle the funds as he pleased, and not a trustee for a limited purpose.

In summary, we think there was evidence from which the jury could reasonably find that the money received by the appellant was not the proceeds of a loan, but was entrusted to him for a specific purpose, and that his conversion of the funds was larceny after trust. The issue was argued to the jury by able counsel, and the appellant finds no fault with the court's instructions. We see no reason to disturb the jury's finding.

III

Other arguments advanced by the appellant require only brief discussion. First, he claims that he secured immunity from prosecution under 15 U.S.C. §77v(c) because he was subpoenaed by the Securities and Exchange Commission to testify and to produce corporate records of Parkwood and its affiliated corporations. He refused to testify, claiming his privilege against self-incrimination, but did produce the

corporate records. Since his plea of self-incrimination was honored and he did not give testimony he acquired no immunity. He had no right to refuse to produce the books and records of the corporations. *United States* v. *White*, 322 U.S. 694 (1944). Immunity from prosecution under the provisions of 15 U.S.C. §77v(c) accrues only when a witness invokes his privilege against self-incrimination and is thereafter compelled to testify or to produce his personal records. *United States* v. *Abrams*, 357 F.2d 539, 548-549 (2d Cir. 1966), *cert. den.* 384 U.S. 1001; Cf. *United States* v. *Monia*, 317 U.S. 424 (1943).

The appellant contends also that he was deprived of a fair and speedy trial because a period of some five years elapsed between the dates of the offenses charged against him and the date of the indictment. The record shows, however, that the prosecution of the appellant resulted from an extended investigation into the complicated and tangled affairs of the appellant and his corporations. There is no suggestion of any purposeful or otherwise improper delay in the conduct of the investigation, nor is there any showing of prejudice to the appellant caused by the delay. In these circumstances the appellant's argument must be rejected. *Tynan* v. *United States*, 126 U.S. App. D.C. 206, 376 F.2d 761, *cert. den.* 389 U.S. 845 (1967).

We see no basis for reversal in the fact that the District Court gave the standard *Allen* charge. *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. den.* 387 U.S. 934 (1967).

The judgment is

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,168

UNITED STATES OF AMERICA

v.

CLARENCE JOHNSON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Decided June 19, 1970

Mr. John C. Reid (appointed by this court) for appellant.

Mr. Robert C. Crimmins, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery*, United States Attorney, *John A. Terry* and *Richard A. Hibey*, Assistant United States Attorneys, were on the brief, for appellee.

Before McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*.

McGOWAN, *Circuit Judge*: After a jury trial in the District Court, appellant was convicted of five counts of armed robbery, six counts of assault with a dangerous weapon, and one count of carrying a dangerous weapon. D.C. Code §§ 22-2901, 22-502, 22-3204. Concurrent prison sentences were imposed in respect of each count. In this court appellant complains that (1) the evidence was insufficient to sustain

his conviction on the robbery and assault charges and (2) the so-called *Allen* charge given by the trial judge was unduly coercive under the circumstances. We affirm.

I

At approximately 1 P.M. on the date of the robbery, two police officers observed appellant's white 1960 Corvair sedan, driven by appellant and occupied by five companions, cruising slowly in the lot of a Safeway store at 17th and I streets, Northeast. One of the officers testified that appellant was driving the car and the occupants appeared to be "casing" the store. When they sighted the police car, they took off at a high rate of speed and were lost in traffic. The officers noted the D.C. tag number, which was traced to appellant.

Not long thereafter, at approximately 2:55 P.M., a Safeway store at 6501 Georgia Avenue, Northwest, was robbed by five armed men. After the robbery, the men fled the store, crossed the street and entered what the pursuing victims testified to be a white 1960 or 1961 Corvair sedan which began to move before all the doors were closed, indicating that a driver was behind the wheel while the holdup took place. Employees of the store testified to the taking of money from the store cash registers totalling $2,226.22.

The incident was immediately reported to the authorities, and the relevant facts broadcast over the police radio. Hearing the broadcast, the officers who had first observed appellant's auto at 1 P.M. proceeded to the vicinity of appellant's home, knowledge of the location of which they had gotten from the license tag check. Shortly thereafter, appellant drove up and the officers approached the car. Seeing a pistol on the floorboard of the car, appellant was taken into custody, and $292.00 in bills, $3.00 in quarters, and revolver ammunition were found in appellant's pocket. The pistol, for which appellant did not have a license, was also seized.

The Government's case at trial consisted of descriptions

of the event by the various victims, the testimony of two employees who observed the robbers as they left the store and entered the vehicle, and the testimony of the police officer about the earlier observation and the subsequent arrest. None of the Safeway employee witnesses could identify appellant.

At the close of the Government's case, appellant moved for a judgment of acquittal which was denied. Appellant presented no evidence.

In light of the extensive indictment, the charge of the trial court was long and complex. Near the close of its original charge, the court stated:

> You should examine the questions submitted with candor and with proper regard and deference to the opinions of each other. You should listen to each other's arguments with a disposition to be convinced.
>
> If much the larger number of jurors are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression upon the minds of so many jurors, equally honest, equally intelligent with him or herself.
>
> If on the other hand, the majority are for acquittal, the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority.

The jury deliberated from 3:35 to 5:00 P.M., and were excused for the night without having reached a verdict. Shortly after resuming the next morning, it reported a deadlock; and at 10:10 A.M. the following charge was given:

> Ladies and gentlemen of the jury, the mode for deciding questions of fact in criminal cases is by verdict of a jury.
>
> In a large proportion of cases, absolute certainty cannot be attained or expected.
>
> Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own con-

victions, and no mere acquiescence in the conclusion of his fellow jurors, yet in order to bring the minds of twelve jurors to a unanimous verdict, each juror must examine the questions submitted with candor and with proper regard and deference to the opinions of each other.

With this in view, it is your duty to decide the case if you can conscientiously do so.

In this case, the burden of proof is on the government to prove beyond a reasonable doubt every element of the offenses charged.

If the government fails to sustain this burden, you must find the defendant not guilty, but in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

On the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many jurors, equally honest, equally intelligent with himself, who have heard the same evidence with the same attention and who equally desire to arrive at the truth under the sanction of the same oath.

On the other hand, if the majority are for acquittal, the minority ought to ask themselves seriously whether they might not reasonably doubt the correctness of the judgment which is not concurred in by most of those with whom they are associated.

In like manner, the minority should question the weight or sufficiency of that evidence which fails to sway the minds of their fellow jurors.

I want you to go back to the jury room and consider the case in the light of these additional observations that I have given you.

The jury retired to the jury room at 10:25 and returned at 2:20 P.M. with a verdict of guilty on all counts. This appeal from the robbery and assault convictions followed. No appeal was taken from the conviction for carrying a dangerous weapon.

II

Appellant's claim of error in the denial of his motion for acquittal rests heavily upon the fact that the two Safeway employee witnesses, who actually saw the bandits depart in the white Corvair, could not identify appellant as either one of the armed robbers who came into the store or as the driver of the car in which the get-away was accomplished.[1] It is also insisted that there was no specific testimony establishing that there was a driver waiting in the car for the return of the five described as having come into the store. Lastly, appellant asserts that white Corvair cars are not uncommon and, therefore, the observation of appellant and his companions earlier in the afternoon adds nothing to the proof.

We are not persuaded by this approach. It may be that there was a time when police officers did not observe so closely cars and their occupants in the vicinity of a Safeway store, but it is this kind of alertness which provides the police today with some slight chance of coping with the hit-and-run crime made possible by the combination of disoriented youths, easy access to guns, and the seemingly unrestricted availability of credit to buy automobiles, so prevalent in the contemporary urban scene.

That alertness supplied the license number of an automobile which, in turn, provided the key to detection. While Corvairs, and even white Corvairs, are not novel, when

(1) the circle is narrowed to a 7-8 year old white Corvair sedan occupied by five or six men,

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[1] The Assistant Manager of the store that was robbed testified that he pursued the five fleeing bandits. He saw them run to a white Corvair which began to move before the doors were shut. He and another employee in their own car followed the white Corvair for a time but broke off the pursuit when it appeared likely that they might be shot at. The witness later in the day viewed appellant's car at the police station, and said that it looked like the one used by the robbers.

(2) appellant is not only the undisputed owner of a car of that description but is also firmly identified as the driver of one such car seen "casing" another Safeway only two hours before the robbery of the Safeway charged in the indictment (and heading off at high speed when a police car is spotted).

(3) there is evidence rationally indicating that there was a driver waiting in the car outside the Safeway that was robbed,[2] and

(4) shortly after the robbery, appellant drives the car home, armed and in possession of some hundreds of dollars in cash, an amount within a reasonable range of an aliquot share of the sum taken from the Safeway.[3]

we think the case presents a combination of elements which a reasonable jury could conclude comports with the essence of the reasonable doubt standard.

The flow of events emerging from the testimony does not, of course, fix appellant's guilt beyond peradventure, but it creates that aura of probability which warrants committing the matter to the good sense of the jurors, instructed as to the legal standard of reasonable doubt and informed by their instinct for recognizing that point beyond which the odds of a miscarriage of justice become too great for the individual conscience to bear. There is no automatic and invariable measure by which the requisite *quantum* of evidence can be determined. The shadings of fact are infinite. *Compare Bailey v. United States*, 128 U.S.App.D.C. 354, 389 F.2d 305 (1967), *with Goodwin v. United States*, 121 U.S.App.D.C. 9, 347 F.2d 793 (1965). The legal formulae are, of course, readily at hand, but their incantation still leaves subjective

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2. As noted above, the witness who saw the robbers flee to the white Corvair testified that the car began to move before all the doors were closed.

3. The evidence showed at least five, and very likely six, participants in the robbery. The amount on appellant's person was approximately one seventh of the $2226 stolen.

judgments to be made. We cannot say here that the spectre of injustice was so perilously present as to make the judge's choice to abide by the jury's decision an unacceptable one. *See Crawford v. United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967).

III

Appellant's second assignment of error concerns the use of the *Allen* charge.[4] Thus there is raised again in this cir-

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[4] The name derives from the case of Allen v. United States, 164 U.S. 492 (1896), in which the Supreme Court refused to reverse because the jury had, after beginning its deliberations, been summoned to return for further instructions. *See also* Kawakita v. United States, 343 U.S. 717 (1952). The instructions so given were characterized by the Court in *Allen* as follows (at p. 501):

> ". . . These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions were taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in *Commonwealth v. Tuey*, 8 Cush. 1, and by the Supreme Court of Connecticut in *State v. Smith*, 49 Connecticut, 376, 386."

cuit the widening challenge to which this method of instructing juries has been subjected.[5] The argument derives from a rationale similar to that employed by the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), namely, that the jury must be protected from all potentially coercive influences. A further consideration is said to be the defendant's purported "right" to a mistrial when the jury's deliberations are prolonged. The rule of unanimity is imposed to guarantee as much certainty as is humanly possible. If such certainty does not exist, it is unfair, so the argument goes, to induce it artificially.

Contrarily, considerations of efficient judicial administration argue eloquently for affording the trial judge some opportunity to ferret out the petty disagreements and personality clashes which jeopardize the jury's functioning, while leaving undisturbed substantial disputes over the evidence in the case. The problems presented by these conflicting approaches have recently been subjected to expert exploration and the exercise of experienced and informed judgment by the American Bar Association Project on Minimum Standards for Criminal Justice. Its distinguished Advisory Commitee on the Criminal Trial, chaired by Justice Walter V. Schaefer of the Illinois Supreme Court, analyzed the competing considerations at length (Standards Relating to Trial by Jury, pp. 145-158) and concluded to

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[5] *See, e.g.*, United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969) (modifying the *Allen* charge in that circuit); Andrews v. United States, 309 F.2d 127 (5th Cir. 1962) (Wisdom, J., dissenting); Huffman v. United States, 297, F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting); Jenkins v. United States, 117 U.S.App.D.C. 346, 330 .F.2d 220, 221 (1964) (Wright, J., dissenting); Note, *On Instructing Deadlocked Juries*, 78 YALE L. J. 100 (1968); Note, *Due Process, Judicial Economy and the Hung Jury: A Re-Examination of the Allen Charge*, 53 VA. L. REV. 123 (1967); Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386 (1964).

recommend the following standard, which subsequently received the approval of the House of Delegates:

> § 5.4 Length of Deliberations; deadlocked jury
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

This approach, recently adopted by the Seventh Circuit in *United States v. Brown*, 411 F.2d 930 (1969),[6] impresses

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[6] The court in this case rejected constitutional claims that the use of the *Allen* charge in any form conflicts with the

the jurors at the outset with the gravity of their responsibilities. Given after an apparent deadlock, it may free a jury mired in irrelevant disagreement usefully to return to the business of evaluating the evidence. Yet it is relatively free of potentially coercive references, does not tend to place proponents of a minority view in a vulnerable position, and does not perpetuate the unfortunate fiction that, in case of a mistrial, another jury will inevitably be assembled to consider the case.[7]

A prime consideration motivating the promulgation of the ABA Standard is the large amount of litigation which the use of the original *Allen* charge has engendered. We, on occasion, have seen criminal appeals in which it is the only issue raised, and we can, therefore, fully understand why a decade ago the Arizona Supreme Court ruled it out because its "evils far out-weigh the benefits." *State v. Thomas*, 86 Ariz. 161, 166, 342 P.2d 197, 200 (1959).[8] One of the sources of trouble on appeal has been that the language actually used tends to vary from judge to judge, and this lack of

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Sixth Amendment right to jury trial and the due process of law guaranteed by the Fifth. It was impressed, however, with the difficulties arising out of varying forms of the charge and some of the elements usually contained in it. It concluded that "it would serve the interests of justice to require under our supervisory power that, in the future, district courts within this Circuit when faced with deadlocked juries comply with the standards suggested by the American Bar Association's Trial By Jury publication." It affirmed the conviction in the case before it, but required the observance for the future, in both civil and criminal cases, of the recommended standards.

[7] The question of whether a mistrial will or will not be followed by a renewed prosecution is so speculative that nothing should be said on the matter either way.

[8] Similar outlawing at the state level through judicial supervisory power has occurred in Montana. State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960).

uniformity in a delicate context is full of pitfalls.[9] With this circumstance in mind, we think it significant that the ABA Project was at pains to set out in its Commentary (pp. 146-7) to Section 5.4(a) of the Standard the text of an instruction which it regarded as consistent with Section 5.4 (a). This is Instruction 8.11 of Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 97-8 (1969), which is as follows:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

We note the essential identity of this charge with what is said on the subject in the Handbook for Jurors serving in

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[9] In the latest rejection by this court of a thorough-going challenge to the *Allen* charge, Judge (now Chief Justice) Burger concluded his opinion by noting that "considerable work for this court would be eliminated if District Judges would consistently use a form of instruction plainly within *Allen*." Fulwood v. United States, 125 U.S.App.D.C. 183, 186, 369 F.2d 960, 963 (1966). Judge Burger served as Chairman of the ABA Special Committee on Minimum Standards in 1968-69.

the United States District Court, which has been prepared and distributed under the authorization of the Judicial Conference of the United States. A distinguished member of the District Court of this Circuit, the late Alexander Holtzoff, was a member of the committee that prepared this handbook. Its admonitions to the jurors on this subject are as follows:

> Jurors must enter the discussion with open minds. They should freely exchange views. They should not hesitate to change their opinions if they are shown to be wrong.
>
> In a criminal case all jurors must agree on the verdict. This is also required in a civil case, unless the jury is otherwise instructed by the court.
>
> The jurors have a duty to give full consideration to the opinion of their fellow jurors. They should try to reach a verdict whenever possible. However, no juror is required to give up any opinion which he is convinced is correct.

The ABA Project has not, in any meaningful sense, recommended abandonment of the *Allen* charge. Neither has it proscribed its use after deadlock. It has recommended the elimination from the charge of the references to a deference owed by a minority to a majority. If Section 5.4(a) of the ABA recommendation, relating to the content of the charge, be compared closely with the Supreme Court's summary in *Allen* itself, Note 2 *supra*, it will be seen that this is the only element of the *Allen* charge as approved by the Supreme Court that is eliminated.[10] But it is the one which has widely been thought to contain the true dangers to free and unfettered exercise of individual judgment and expression of conscience which is at the very core of the jury system. Many trial judges, although still using the *Allen* charge,

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10. The ABA has also ruled out something which was never in the *Allen* charge as approved by the Supreme Court, namely, the references to the prospect of a further trial if the jury could not agree.

have abandoned this element of it long ago. With the benefit of the new American Bar Association analysis and recommendation, trial judges in this circuit may hereafter think it desirable to do the same.

The charge given in the instant case was, however, substantially in accord with the standards heretofore prevalent in the District of Columbia. *See* Instruction No. 41, Junior Bar Association Criminal Jury Instructions for the District of Columbia (1966). That charge, even with some minor changes in phraseology likely to influence a jury to agree on a verdict, was approved in *Fulwood*. The court there found that the charge as given was not coercive, relying *inter alia* on the fact that the judge did not send the jury out to deliberate forthwith but recessed deliberations for the night, and further that the judge expressed merely a "hope" that the jury would agree.

Fulwood would not have foreclosed appellant from claiming that in the circumstances of this case—close as it was on the sufficiency of the evidence, and with the jury sent to deliberate forthwith and without the softening of "hope" language—the charge did have coercive impact. But the defense trial counsel did not object to the charge. This is not merely a technicality. There are situations where defense counsel may believe that it is better to get a verdict from this jury than a mistrial; *e.g.*, the case of a crime so dangerous as to make a *nolle prosse* unlikely; where there is little possibility of the disappearance or weakening of incriminating evidence; or where the current record taken as a whole is as likely to produce a verdict of not guilty as in any future trial. We cannot say that such tactical considerations guided this defense trial counsel, but the possibility is certainly strong enough to lead us to be cautious against any finding of plain error. FED. R. CRIM. P. Rule 52(b).

A separate question to be considered is whether it would not be better to abandon the majority-minority element of

the *Allen* charge, and to focus that charge on its major function of counselling the jury to consult open-mindedly with a disposition to hearken to fellow-jurors, and to agree when no violation of conscience is involved. Adoption of such a rule may well be in the interest of the efficient administration of justice, even though charges containing the majority-minority language are not necessarily, or even likely, to be coercive; it would avoid recurring controversies, turning upon subtle questions of coercion in the context of each case. This ground was not considered in *Fulwood*, but it did commend itself to the ABA Project.

In view of the foregoing, a decision adopting such a rule prospectively might well be permissible for a panel, since it does not require overruling *Fulwood* on the grounds identified in that opinion. But in the circumstances before us we think it more responsive to the tradition of this court for this kind of supervisory jurisdiction to be exercised, if at all, only by the court *en banc*. Such consideration *en banc* might also have the benefit of the views of the committee lately authorized by the Judicial Conference of this circuit to examine the standards recommended by the ABA Project and to recommend for implementation by the appropriate courts of this circuit such of those standards as appear likely to improve the administration of criminal justice in this jurisdiction. However, we do not think it appropriate to assert authority as a panel to reconsider *Fulwood*.

The judgment appealed from is, accordingly, affirmed.

It is so ordered.

ROBB, Circuit Judge, *concurring in part and dissenting in part*: I agree with the majority that this case should not be reversed because of the trial judge's use of the "Allen charge". However, I do not agree that the evidence was sufficient to sustain appellant's conviction; in my opinion

the trial judge should have granted the motion for judgment of acquittal.

I

The case for the prosecution was circumstantial. Taking the circumstances in chronological order we begin with the testimony of a police officer that at about 1:00 o'clock on the afternoon of November 4, 1968, he and another policeman observed an automobile driven by the appellant Johnson "driving very slowly across the driveway * * * in front of the window of the Safeway store" at 17th and I Streets, N. E. There were five other men in the car with Johnson, and all of the men seemed to be looking at "what was going on in the store". The officer volunteered the conclusion that the men "appeared to be casing the Safeway store". He said that "upon seeing us they took off at a high rate of speed" and disappeared in heavy traffic. He testified that the officers took the tag number of the car and "as a result of getting the tag registration" learned the name and address of the appellant. Except for an inference from this testimony there was no evidence that the car was registered in the appellant's name. The officer did not testify as to the make, model or color of the car.

Next we have testimony that at about 3 o'clock on the afternoon of November 4, 1968, the Safeway store at 6501 Georgia Avenue, N. W. was held up and robbed by five men; $2,226.22 was taken. This store is in a different section of the city and some five or six miles from the store at 17th and I Streets, N. E. There was testimony that when the five robbers left the store they escaped in a "white Corvair sedan" the model being "approximately '60, '61". Witnesses testified that the "car took off before they finished getting the doors closed", leading the assistant manager of the store to conclude that there was a driver waiting in the car while the holdup took place. However, no one saw the driver and since the five men could not have entered the car simultaneously

one of them might well have got behind the wheel and quickly put the car in motion while the others were closing the doors. No one identified the appellant as one of the five men who robbed the store and left in the getaway car.

Concluding its case, the government proved that having heard a radio complaint of the robbery of the Safeway store at 6501 Georgia Avenue, N. W., the officers who two hours before had seen the appellant and his companions at 17th and I Streets, N. E., went to the vicinity of the appellant's house at 1521 A Street, N.E. This location was some five or six miles from the scene of the holdup. At about half past three the appellant, who was then alone, drove up and was arrested. He had a loaded pistol on the floor of the car and $292.00 in assorted bills, and $3.00 in quarters, in his pocket—substantially less than a one-sixth share of the proceeds of the robbery. The government introduced no evidence to show the amount of money taken from each individual cash register at the Safeway store; such evidence might have suggested that the $292.00 in bills and $3.00 in quarters had some rational relationship to the specific robbery with which appellant was charged.

The police officer who arrested the appellant and who previously saw him driving the car was not asked to describe the car and did not do so, and the record is silent as to what the tag number was. The only evidence as to the make, model and color of the car was that it was "of the same description" as the car mentioned in the radio complaint. The contents of the radio complaint were not disclosed by the evidence so that we have only a questionable inference that the car was a white Corvair. One of the witnesses to the holdup testified that "later on in the day" of the robbery he went to a police station and saw "a 4-door Corvair sedan" which looked like the same automobile used in the getaway. There was no evidence that the car at the police station was the car that the appellant had been driving or that the appellant was in any way connected with it.

This was the government's entire case. In my judgment this evidence, although it may have generated a suspicion that appellant had participated in the robbery, fell far short of the proof that would justify a jury in finding guilt beyond a reasonable doubt; in other words, it failed to meet the standard under which a trial judge is permitted to allow a criminal case to go to the jury. See *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. den.*, 331 U.S. 837 (1947). In a case such as this, "in which the evidence relied upon to establish guilt is entirely circumstantial, the trial judge may not deny a motion for judgment of acquittal and send the case to the jury unless, taking the view most favorable to the Government, there is sufficient evidence to support a verdict of guilty beyond a reasonable doubt". *Battles* v. *United States*, 388 F.2d 799, 801-802 (5th Cir. 1968). That standard not having been met, in my opinion, and there being "no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt" the motion for judgment of acquittal should have been granted. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392-393, 160 F.2d 229, 232-233, *cert. den.*, 331 U.S. 837 (1947). For it is the function of a judgment of acquittal to protect against a decision by the jury based on speculation, surmise, bias or prejudice without evidence adequate in law to support a finding of guilt, *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 345, 218 F.2d 39, 41 (1954); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963); *Sleight* v. *United States*, 65 App. D.C. 203, 205, 82 F.2d 459, 461 (1936); and in passing upon a motion for judgment of acquittal, particularly in a case depending upon circumstantial evidence, the trial judge must be careful to differentiate "between pure speculation and legitimate inference from proven facts". *Curley* v. *United States*, 81 U.S. App. D.C. 389, 393, 160 F.2d 229, 232, *cert. den.*, 331 U.S. 837 (1947).

The requirement that guilt must be proved beyond a reasonable doubt is not a dry legal formula or a routine incantation; it is the standard which for centuries has been used, understood and applied by lawyers, judges and jurors, the standard which for centuries has shielded the innocent man from "dubious and unjust convictions" by whimsical juries, "with resulting forfeitures of life, liberty and property." *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949). It has been "a prime instrument for reducing the risk of convictions resting on factual error," a doctrine designed to give every individual "confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In Re Winship*, 397 U.S. 358, 363-364 (1970). (See also *Egan* v. *United States*, 52 App. D.C. 384, 393, 287 Fed. 958, 967 (1923); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 283, 184 F.2d 394, 403 (1950).

The majority reasons that the conviction in this case should be sustained because "the flow of events emerging from the testimony * * * creates that aura of probability which warrants committing the matter to the good sense of the jurors," a probability said to be reinforced by "their instinct for recognizing that point beyond which the odds of a miscarriage of justice become too great for the individual conscience to bear." I cannot agree that a criminal conviction can rest on an "aura of probability" and "instinct". A probability of guilt is not enough; guilt, according to the basic principles of our jurisprudence, must be established beyond a reasonable doubt. Instinctive action imports action without thought and is the very antithesis of the careful consideration and reasoned decision that should be required of jurors.

The majority finds here a "combination of elements which a reasonable jury could conclude comports with the essence of the reasonable doubt standard." One such element which it apparently finds persuasive is the "alertness" of the po-

lice in coping with "hit-and-run crime made possible by the combination of disoriented youths, easy access to guns, and the seemingly unrestricted availability of credit to buy automobiles, so prevalent in the contemporary urban scene." I, too, commend the alertness of the police and condemn the shocking rise of crime in our community. But I find these factors irrelevant to the question of whether the government at trial met its burden of introducing evidence sufficient to prove this appellant's guilt beyond a reasonable doubt. See *Stevens* v. *United States*, 115 U.S. App. D.C. 332, 334, 319 F.2d 733, 735 (1963). Granting that Washington is crime-ridden, the remedy is not the lowering or abandonment of a time-honored shield in favor of a standard which permits convictions upon proof of a probability of guilt to the satisfaction of the jurors' instincts. The prevalence of crime should not justify jury verdicts by guesswork. The fact that there are disoriented youths, easy access to guns and easy credit is also irrelevant to the issue of this appellant's guilt or innocence. Permitting these considerations to enter a jury's deliberations is to allow it to act "on what would necessarily be only surmise and conjecture, without evidence." *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 346, 218 F.2d 39, 42 (1954). By giving weight to such matters the majority in my judgment has condoned an impermissible method of decision-making by a jury and has lowered the traditional safeguard of proof beyond a reasonable doubt.

II

I agree with the majority that there was not plain error in the use of the "Allen charge" by the trial judge; indeed I would find no error even had the matter been properly raised in the District Court. And I fully agree with the majority that any alteration of the standard "Allen charge", approved by this court in *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. den.*, 387 U.S. 934 (1967) should be promulgated, if at all, only by the court

en banc. However, I do not concur in the discussion in which the majority expresses its view about the "Allen charge". Although that discussion is largely unnecessary to the decision I think it appropriate to suggest briefly some points of my disagreement.

The "Allen charge" given by the district judge was in the form approved by the Supreme Court in *Allen* v. *United States*, 164 U.S. 492 (1896). As the Supreme Court noted, the charge was taken literally from a charge approved by the Supreme Court of Massachusetts in *Commonwealth* v. *Tuey*, 8 Cush. 1 (1851). On that court sat Mr. Chief Justice Lemuel Shaw, one of the great judges this country has produced. The charge was again approved by the Supreme Court in *Kawakita* v. *United States*, 343 U.S. 717 (1952), affirming 190 F.2d 506, a capital case. As recently as 1966 it was approved by a panel of this court in *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. den.*, 387 U.S. 934 (1967). The opinion in that case was written by Circuit Judge Burger, now Chief Justice of the United States. A petition for rehearing *en banc* was denied.

I see no reason to abandon or substantially revise the "Allen charge". As Judge Burger wrote in *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 185, 369 F.2d 960, 962 (1966), *cert. den.*, 387 U.S. 934 (1967):

> "The *Allen* charge is a carefully balanced method of reminding jurors of their elementary obligations, which they can lose sight of during protracted deliberations. It is perfectly valid to remind them that they should give some thought to the views of others and should reconsider their position in light of those views. The charge as given here did not *require* the jury to reach a verdict but only reminded them of their duty to attempt an accommodation. While it suggests to the minority that they reconsider their position in light of a majority having a different view, it reminds them that they should not acquiesce in a verdict which does not represent their own convictions."

Any group of men and women sitting around a conference table to decide a question of fact, whether in or out of a jury room, could with profit listen to the sensible advice of the "Allen charge". On the other hand the diluted version of the charge proposed by the American Bar Association is in my opinion an invitation to a stubborn or recalcitrant juror to persist in a blind determination that his views shall control, thereby producing a hung jury.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 21 1970
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No. 442

In the Supreme Court of the United States

OCTOBER TERM, 1970

VICTOR J. OSBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on July 1, 1970. On July 24, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-071—70

QUESTIONS PRESENTED

1. Whether petitioner had immunity from prosecution under Section 22(c) of the Securities Act of 1933 (15 U.S.C. 77v(c)) based on an examination by the Securities and Exchange Commission of records of a corporation with which he was associated.

2. Whether pre-indictment delay deprived petitioner of a speedy trial or otherwise resulted in any prejudice to petitioner.

3. Whether inclusion of the *Allen* charge in instructions to the jury constituted reversible error.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of nine counts charging larceny after trust in violation of 22 D.C. Code 2203.[1] On January 3, 1969, he was sentenced to imprisonment for three to nine years on each count, the sentences to run concurrently. The court of appeals affirmed. (Pet. App. A1–18).

The evidence, involving intricate financial transactions between petitioner, an attorney, and the American Province of the Sisters of the Divine Savior, which resulted in the conversion of funds belonging to the religious order, is detailed in the opinion below (Pet. App. A1–11) and need not be restated here.

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[1] Petitioner was charged but acquitted on three counts of fraud by wire, on two counts of mail fraud, and on one count of interstate transportation of a security taken by fraud.

ARGUMENT

1. Petitioner contends that he was effectively given immunity from prosecution under 15 U.S.C. 77v(e) based upon examination by the Securities and Exchange Commission of the corporate records of Parkwood, Inc., and affiliated companies, following petitioner's appearance before an Examiner pursuant to a subpoena duces tecum where he "reserved" the privilege against self-incrimination. The argument is wholly unfounded.

The essence of Section 77v(e) is a *quid pro quo* where the witness is granted immunity from prosecution in exchange for testimony or records as to which he possesses a privilege against self-incrimination. It follows that immunity is not afforded a witness on production of records with respect to which he has no Fifth Amendment privilege to assert, as where he acts as agent for a corporation. Here, as the court below properly observed (Pet. App. A 17–18), petitioner was subpoenaed to produce only the records of the corporations with which he was associated, not his own personal records. Under decisions of this Court, he had no right to refuse to produce these records. *United States* v. *White*, 322 U.S. 694, 704–705 and authorities cited; see also *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286; compare *United States* v. *Kordel*, 397 U.S. 1, 8–10. Consequently, their production—whether or not deemed to be coupled with an assertion of a privilege against self-incrimination—did not entitle petitioner to the immunity granted by the

statute. *United States* v. *Abrams*, 357 F. 2d 539, 548–549 (C.A. 2), certiorari denied, 384 U.S. 1001.

Nothing in *Edwards* v. *United States*, 312 U.S. 473, relied on here by petitioner (Pet. 13–14), is to the contrary. There, unlike the present case, the defendant alleged in his pleadings that after having claimed his privilege against self-incrimination before an officer of the S.E.C., he "under compulsion, testified under oath, pursuant to various questions propounded and asked him" concerning his identity and relationship to the various trusts and organizations which were the subject matter of the prosecution. *Id.* at 475.

2. Petitioner also contends that he was denied the right to a speedy trial by an allegedly unnecessary pre-indictment delay of five years. As the court below noted, however, the "prosecution of the appellant resulted from an extended investigation into the complicated and tangled affairs of the appellant and his corporations. There is no suggestion of any purposeful or otherwise improper delay in the conduct of the investigation, nor is there any showing of prejudice * * * caused by the delay" (Pet. App. A18). In these circumstances, it is plain that no constitutional right was violated. See, *e.g.*, *Tynan* v. *United States*, 376 F. 2d 761 (C.A.D.C.), certiorari denied, 389 U.S. 845; *United States* v. *Lee*, 413 F. 2d 910 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Feinberg*, 383 F. 2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044.[2]

[2] In *United States* v. *Marion*, D.D.C., Crim. No. 672–70, the court dismissed an indictment because of a pre-indictment delay of two and a half years. The government has noted a direct appeal to this Court.

3. Petitioner argues that the giving of a supplemental "Allen" charge constituted reversible error. He relies on *United States* v. *Johnson*, No. 23,168, C.A.D.C., decided on June 19, 1970 (after the decision below), in which the panel reviewed the "Allen" instruction and made a suggestion for consideration *en banc* of the instruction as presently approved in *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. The court in *Johnson* indicated that some modification might be appropriate in the exercise of the court's supervisory power. As we have pointed out in a number of recent briefs in opposition, however, although some federal courts have adopted prospective modifications of the standard "Allen" charge, none has held that the fact it was given constitutes reversible error. See *United States* v. *Wynn*, 415 F. 2d 135 (C.A. 10), certiorari denied, 397 U.S. 994; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837. There is thus no conflict among the circuits. See also *Kawakita* v. *United States*, 343 U.S. 717, 744, affirming 190 F. 2d 506 (C.A. 9). Even if the District of Columbia Circuit ordered a modification of the "Allen" instruction in the exercise of its supervisory power—which thus far it has not done—such an action would not warrant further review by this Court. See *Fisher* v. *United States*, 328 U.S. 463, 476–477.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1970.